

CITY COUNCIL
ATLANTA, GEORGIA

06-O-****

A SUBSTITUTE ORDINANCE BY FINANCE/EXECUTIVE COMMITTEE

A SUBSTITUTE ORDINANCE TO REPEAL PART TWO, ARTICLE X, DIVISION 12 OF THE CODE OF ORDINANCES OF THE CITY OF ATLANTA SO AS TO ENACT A NEW PART TWO, ARTICLE X, DIVISION 12, KNOWN AS "THE EQUAL BUSINESS OPPORTUNITY PROGRAM" FOR A FIVE-YEAR PERIOD; CONSISTENT WITH CERTAIN FINDINGS BASED ON THE EQUAL BUSINESS OPPORTUNITY DISPARITY STUDY AND LEGAL ANALYSIS REPORT AND OTHER DATA RELATIVE TO THE BUSINESS OPPORTUNITIES AVAILABLE TO MINORITY-AND FEMALE-OWNED BUSINESSES IN THE ATLANTA REGION; TO REPEAL CONFLICTING ORDINANCES; AND FOR OTHER PURPOSES.

WHEREAS, a study of available data, including data maintained by the City of Atlanta and other public agencies, data gathered from a survey of businesses in the Atlanta Region, and other commercially available data regarding the economic opportunities available to businesses in the Atlanta Region was conducted by Griffin and Strong, P.C. under the direction of Rodney K. Strong, Esq., concluding in the City of Atlanta Equal Business Opportunity Ordinance Disparity Study and Legal Analysis (the "Disparity Study"); and

WHEREAS, the purpose of conducting this study was to determine whether the economic opportunities available to Minority- and Female-owned businesses seeking contracting opportunities in the Atlanta Region were equal to those opportunities available to white male-owned businesses in the Atlanta Region; and

WHEREAS, the Disparity Study identified statistically significant disparities in the use of Minority- and Female-owned businesses in the Atlanta Region when compared to similarly situated white male owned firms, which were the result of discrimination on the basis of race, gender and ethnicity; and

WHEREAS, the Disparity Study specifically identified evidence on self-employment showing minorities and women continue to show disparities in entry into self employment; and

WHEREAS, the Disparity Study specifically identified evidence on loan denials from the National Survey of Small Business Finance showing minorities and women continue to have higher rates of loan denials; and

WHEREAS, the Disparity Study specifically identified evidence showing minorities and women continued to be substantially underutilized in the private marketplace; and

WHEREAS, these statistical and anecdotal findings taken as a whole give rise to an inference of continued discrimination and/or the continuing effect of past discrimination against minorities and women in business transactions in the Atlanta Metropolitan Statistical Area. The foregoing findings on the private sector lead us to conclude that the City of Atlanta has a strong basis in evidence to take narrowly tailored measures to ensure that it is not a passive participant in a private scheme of discrimination against women and minorities as prime or subcontractors; and

WHEREAS, the Disparity Study demonstrates that a program by the City of Atlanta to reinforce and support outreach efforts to open contracting opportunities to all businesses will promote equal opportunity for all businesses regardless of race, gender or ethnicity, eliminate the discrimination suffered by Minority- and Female-owned businesses, and ensure that the City of Atlanta is not a passive participant in ongoing private sector discrimination in the Atlanta Region; and

WHEREAS, the Atlanta City Council, through the Finance and Executive Committee, received the Disparity Study on October 11, 2006; and

WHEREAS, there was specific, recorded evidence adduced that Minority- and Female-owned businesses experience real and verifiable discrimination by race, gender and ethnicity in the conduct of commerce in the Atlanta Region; and

WHEREAS the City of Atlanta desires to do business only with those contractors who offer equal business opportunities for contracting work or services, without regard to business ownership by race, gender or ethnicity, and who do not tolerate or practice discrimination in contracting or subcontracting work or services in their private and public business activities; and

WHEREAS, the City of Atlanta has determined that it is necessary to use its purchasing and contracting functions to ensure equal competitive opportunities for all businesses, regardless of race, gender or ethnicity; and

WHEREAS, the City recognizes the necessity for periodic review of and reporting on the implementation and operation of this division to ensure that it continues to effectuate equal competitive opportunities for all businesses, regardless of race, gender or ethnicity;

NOW THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ATLANTA, GEORGIA, as follows:

SECTION ONE: That Part Two, Division 12 of the Code of Ordinances of the City of Atlanta, Sections 2-1441 through Section 2-1480 be repealed and deleted in their entirety and that the following Sections be inserted in lieu thereof:

Division 12. Equal Business Opportunity

Sec. 2-1441. Short Title.

This division shall be known as the "City of Atlanta's Equal Business Opportunity Ordinance."

Sec. 2-1442. Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

African American shall mean persons having origins in any black racial group of Africa.

African American Business Enterprise (AABE) shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more African Americans.

Asian shall mean persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

Asian Business Enterprise (ABE) shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more Asian individuals.

Atlanta Region shall mean the geographical area consisting of Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, and Walton counties.

Bid shall mean a quotation, proposal, sealed bid or offer to perform or provide labor, materials, supplies or services to the City for a price on an Eligible Project, or for an Eligible Project that generates revenue for the City.

Bidder shall mean any individual, sole proprietorship, partnership, joint venture, or corporation that submits a Bid to the City, or a vendor or contractor that has entered a contract with the City regarding an Eligible Project.

Certification or Recertification shall mean official recognition and approval by the Office of Contract Compliance that a business meets the qualification criteria of an AABE, HBE, ABE, NABE, or FBE, as set forth in this Division. Certification or recertification relates to qualifications regarding ownership, control, and the applicant's economic disadvantage, not the quality of the service or product.

Certified AABE, HBE, ABE, NABE, or FBE shall mean an AABE, HBE, ABE, NABE or FBE which meets the requirements of section 2-1474 of this division, and which has been approved by the Office of Contract Compliance.

City shall mean the City of Atlanta.

Commercially Useful Function: For the purpose of determining whether a Business Enterprise is performing a Commercially Useful Function, OCC shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

- (1) An MFBE performs a Commercially Useful Function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.
- (2) To perform a Commercially Useful Function, the MFBE must be responsible, with respect to material and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.
- (3) To determine whether an MFBE is performing a Commercially Useful Function, OCC will evaluate the amount of work subcontracted by the MFBE, industry practices regarding subcontracting, whether the amount the MFBE is to be paid under the contract is commensurate with the work it is actually performing, the MFBE credit claimed for its performance of the work, and other relevant factors.
- (4) An MFBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MFBE participation. In determining whether an MFBE is such an extra participant, OCC will examine similar transactions, particularly those in which MFBEs do not participate.

Control or controlled : For the purpose of determining whether the owner or owners of a potential MFBE (as used in this definition, "MFBE-Owner", which shall denote one or more owners) Controls the potential MFBE, OCC shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

- (1) For an MFBE-Owner to be deemed to Control the potential MFBE, the potential MFBE must be independent. An independent business enterprise is a business whose viability does not depend on its relationship with another firm or firms.
 - (a) In determining whether a potential MFBE is independent, OCC will scrutinize relationships with other firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (b) OCC will consider whether present or recent employer/employee relationships between the MFBE-Owner and other firms or persons associated with other firms compromise the independence of the potential MFBE firm.
 - (c) OCC will examine the potential MFBE's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MFBE firm.
 - (d) In considering factors related to the independence of a potential MFBE firm, OCC will consider the consistency of relationships between the potential MFBE and other firms with normal industry practice.
- (2) A potential MFBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the MFBE-Owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by persons other than the MFBE-Owner, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the MFBE-Owner, without the cooperation or vote of any other individual, from making any business decision of the business enterprise. This paragraph does not preclude a spousal co-signature on documents.

- (3) The MFBE-Owner must possess the power to direct or cause the direction of the management and policies of the business enterprise and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
 - (a) An MFBE-Owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 - (b) In a corporation, the MFBE-Owner must control the board of Directors.
 - (c) In a partnership, the MFBE-Owner must serve as a general partner, with control over all partnership decisions.
- (4) Individuals who are not the MFBE-Owner may be involved in an MFBE as owners, managers, employees, stockholders, officers, and/or Directors. Such individuals must not, however, possess or exercise the power to control the business enterprise, or be disproportionately responsible for the operation of the business enterprise.
- (5) The MFBE owners of the business enterprise may delegate various areas of the management, policymaking, or daily operations of the business enterprise to other participants in the firm, regardless of whether these participants are African American, Hispanic, Asian, Native American, or female. Such delegations of authority must be revocable, and the MFBE-Owner must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the MFBE-Owner in the business enterprise's overall affairs must be such that OCC can reasonably conclude that the MFBE-Owner actually exercises control over the business enterprise's operations, management, and policy.
- (6) The MFBE-Owner must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the business enterprise is engaged and the business enterprise's operations. The MFBE-Owner is not required to have experience or expertise in every critical area of the business enterprise's operations, or to have greater experience or expertise in a given field than managers or key employees. The MFBE-Owner must have the ability to intelligently and critically evaluate information presented by other participants in the business enterprise's activities and to use this information to make independent decisions concerning the business enterprise's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal

business activities of the business enterprise is insufficient to demonstrate control.

- (7) If state or local law requires the owner of a particular type of firm to have a particular license or other credential, then the MFBE-Owner of that type of firm must possess the required license or credential in order to be deemed in Control. If state or local law does not require an owner to have such a license or credential, OCC will not deny certification solely on the ground that the MFBE-Owner lacks the license or credential. However, OCC may take into account the absence of the license or credential as one factor in determining whether the MFBE-Owner actually controls the firm.
- (8) OCC may consider differences in remuneration between the MFBE-Owner and other participants in the business enterprise in determining whether the MFBE-Owner Controls the business enterprise. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the business enterprise's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business enterprise. OCC may determine that a business enterprise is controlled by its MFBE-Owner although the MFBE-Owner's remuneration is lower than that of some other participants in the business enterprise. In a case where someone other than the MFBE-Owner formerly controlled the business enterprise, and the MFBE-Owner now controls it, OCC may consider a difference between the remuneration of the former and current owner of the business enterprise as a factor in determining who Controls the business enterprise, particularly when the former owner remains involved with the business enterprise and continues to receive greater compensation than the current MFBE-Owner.
- (9) In order to be viewed as Controlling a business enterprise, an MFBE-Owner cannot engage in outside employment or other business interests that conflict with the management of the business enterprise or prevent the MFBE-Owner from devoting sufficient time and attention to the affairs of the business enterprise to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting Control. However, an MFBE-Owner could be viewed as Controlling a part-time business that operates only on evenings and/or weekends, if the MFBE-Owner controls the business enterprise when it is operating.
- (10) An MFBE-Owner may Control a business enterprise even though one or more of the MFBE-Owner's immediate family members

(who themselves are not African American, Hispanic, Asian, Native American, or Female) participate in the business enterprise as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, OCC must make a judgment about the control the MFBE-Owner exercises vis-à-vis other persons involved in the business enterprise as it does in other situations, without regard to whether or not the other persons are immediate family members. If OCC cannot determine that the MFBE-Owner--as distinct from the family as a whole--controls the business enterprise, then the MFBE-Owner has failed to carry her/his burden of proof concerning control, even though s/he may participate significantly in the business enterprise's activities.

Eligible Project shall mean:

- (1) Any City contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26.
- (2) For purposes of this Division, contract or project "value" shall mean either the expenditure of funds by the City, or the generation of revenue for the City by a contractor as a direct result of a City contract.

Female business enterprise (FBE) shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more Females.

Hispanic shall mean persons of Spanish or Portuguese culture with origins in Mexico, South or Central America or the Caribbean Islands, regardless of race.

Hispanic business enterprise (HBE) shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more Hispanic individuals. For purposes of this division alone, references to racial ownership of businesses shall include HBEs.

Joint venture shall mean an association of two or more persons, partnerships, corporations, or any combination of them, established to carry on a single business activity that is limited in scope and duration. The agreement establishing the joint venture, partnership or other multi-entity relationship shall be in writing. Further, participation in a joint venture shall be based on the sharing of real economic interest in the

venture and shall include proportionate control over management, interest in capital acquired by the joint venture and interest in earnings.

Minority and Female business enterprise (MFBE) shall mean a business which is an independent and continuing operation for profit, performing a commercially useful function, and which is owned and controlled by one or more African Americans, Hispanics, Asians, Native Americans, or Females, or a combination thereof.

Native American shall mean persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

Native American Business Enterprise (NABE) shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function and which is owned and controlled by one or more Native Americans.

North American Industry Classification System (NAICS) Code shall mean the standard code that classifies industries by the type of activity in which such industries are primarily engaged.

Office of Contract Compliance (OCC) shall mean the Mayor's Office of Contract Compliance in the City of Atlanta.

Owned or ownership: In determining whether a potential MFBE is Owned by one or more African Americans, Hispanics, Asians, Native Americans, or females, OCC will consider all of the facts in the record, viewed as a whole, including without limitation the following:

- (1) OCC shall deem the Owner of a business enterprise to be whoever possesses at least 51 percent of the business enterprise. There may be more than one Owner.
 - (a) In the case of a corporation, such individual(s) must possess at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
 - (b) In the case of a partnership, such individual(s) must possess at least 51 percent of each class of partnership interest. Such Ownership must be reflected in the business enterprise's partnership agreement.

- (c) In the case of a limited liability company, such individual(s) must possess at least 51 percent of each class of member interest.
- (2) All securities which constitute ownership of an entity for purposes of establishing it as an AABE, HBE, ABE, NABE or FBE must be held directly by African American, Hispanic, Asian, Native American or female individuals or by AABEs, HBEs, ABEs, NABEs or FBEs. No securities held in trust or by any guardian for a minor shall be considered held by African Americans, Hispanics, Asians, Native Americans or females in determining the ownership or control of a corporation.
- (3) Ownership shall be measured as though not subject to the community property interest of a spouse if both spouses certify that only one spouse owns the business and if such assertion is supported by the totality of the evidence considered by the Office of Contract Compliance.
- (4) OCC must find that the individual(s) ownership is real, substantial, and continuing, going beyond pro forma ownership of the business enterprise as reflected in ownership documents. The individual(s) must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

Satisfactorily Completed or Satisfactory Completion shall mean when all of the tasks called for in the subcontract have been accomplished and documented as required by the City. When the City has made an incremental acceptance of a portion of a prime contract, the work on a subcontractor covered by the acceptance is deemed to be satisfactorily completed.

Supplier shall mean a warehouse or manufacturer of materials, supplies or equipment which contracts directly with a Bidder to provide such materials, supplies or equipment on an Eligible Project which involves a trade or service. For purposes of measuring the total contract dollars awarded or paid to suppliers on Eligible Projects, only amounts paid to suppliers of goods customarily and ordinarily used based upon standard industry or trade practices shall be counted.

Sec. 2-1443. Adoption of the Findings and Conclusions of the Griffin & Strong, P.C. Report.

The city council adopts the findings and conclusions of the Griffin & Strong, P.C. Report dated October 2006 (referred to in this division as the "GSPC Report").

Sec. 2-1444. Findings.

Based on the factual predicate established by the GSPC Report incorporated in this division and all other evidence of record, the City makes the following findings regarding substantial barriers to full participation of minorities and women in the private marketplace in the Atlanta MSA and in certain areas of contracting with the City of Atlanta.

- (1) Evidence on self-employment from census data shows that
 - a. Minorities and women continue to show disparities in entry into self employment, after controlling for age, wealth, and other variables.
 - b. In the construction category, non-minority males were twice as likely to be self employed as African Americans and Asian Americans.
 - c. In the service category, non-minority males were three times as likely to be self employed as African Americans and Asian Americans, and almost four times as likely to be self employed as white women.
 - d. More than half of the disparity in self employment income between non-minority males and African Americans was attributable to race.
 - e. When minorities and women are self employed, they earn significantly less than non-minority males. Across all industries, after controlling for other factors, African Americans earned 30 percent less and white women earned 38 percent less than non-minority males from self employment.
- (2) Evidence on loan denials from the National Survey of Small Business Finance shows that:
 - a. The higher rates of loan denials by African American firms reported in survey data was supported by econometric evidence.
 - b. African American, Hispanic American, and female owned businesses reported loan denial rates of 47 percent, 39 percent, and 26 percent, respectively, in contrast to the rate of 21 percent for non-minority male owned firms after controlling for creditworthiness and other related variables.

- (3) Minorities and women continued to be substantially underutilized in the private marketplace.
- a. There is evidence that minority firms won less than 1 percent of private sector commercial subcontracts and less than 2 percent of private sector commercial prime contracts in the Atlanta MSA, figures that were dramatically below their utilization by the City of Atlanta and below reasonable measures of business availability. Moreover, only a small fraction of women and minority subcontractors used on City projects were found to be used on private sector commercial projects.
 - b. Substantial numbers of minorities reported experiencing discrimination as prime contractors and subcontractors in the private marketplace.
 - c. There is evidence that lack of business capacity and experience is not a sufficient explanation for the low levels of utilization in the private sector. Low levels of utilization were found not only in subcontracting, but also on small contracts. Moreover, a private sector regression analysis, after controlling for the effects of variables related to company capacity, years in the business and education of the owner, determined that race and gender were significant factors in explaining the significantly lower earnings of minority and female firms.
 - d. Data from a public entity within the Atlanta relevant market with little history of efforts to include minority businesses (Cobb County, Georgia) revealed negligible prime contractor utilization of minority firms, somewhere between 0 and 1/10th of one-percent. The Cobb County data strongly suggest that without active efforts the rate of minority and female participation in City of Atlanta contracting would be much lower.

After analyzing data on City of Atlanta contracting for the period from January 1, 2001 through June 30, 2005, limiting the pool of available firms to actual bidders, using actual payments as the measure of utilization, disaggregating the data annually by procurement category and by race, ethnicity, and gender, and after controlling for statistical significance, some disparities remained for various minority groups and women in certain procurement categories:

Lack of business capacity and experience was not a sufficient explanation for all of the disparities in M/FBE utilization by the City of Atlanta. Regression analyses, that controlled for differences in firm size and educational characteristics of firm

owners indicate that race and gender remained significant factors in explaining some of the observed statistically significant disparities.

These statistical and anecdotal findings taken as a whole give rise to an inference of continued discrimination and/or the continuing effect of past discrimination against minorities and women in business transactions in the Atlanta MSA. The foregoing findings on the private sector lead us to conclude that the City of Atlanta has a strong basis in evidence to take narrowly tailored measures to ensure that it is not a passive participant in a private scheme of discrimination against women and minorities as prime or subcontractors.

Sec. 2-1445. Statement of Policy.

It is the policy of the City of Atlanta to promote full and equal business opportunity for all persons doing business with the City. The City must ensure that firms seeking to participate in contracting and procurement activities with the City are not prevented from doing so on the basis of the race or gender of their owners. The city is committed to ensuring that it is not a passive participant in any private scheme of discrimination. To ensure that businesses are not discriminated against with regard to prime contracting, subcontracting or other partnering opportunities with the City, the City has developed an Equal Business Opportunity Program.

Sec. 2-1446. Applicability and Implementation.

This division shall apply to all Eligible Projects as defined in section 2-1442, and shall be implemented by the Office of Contract Compliance.

Sec. 2-1447. Duties of Office of Contract Compliance.

Under this division, the Office of Contract Compliance shall have the following authority and duties for the encouragement of non-discrimination in City contracting and the implementation of the equal business opportunity program under this division:

- (1) Administration and enforcement of this division.
- (2) Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate this division.
- (3) Monitoring compliance with the requirements of this division.
- (4) Certification of businesses as AABEs, HBEs, ABEs, NABEs and FBEs in accordance with the standards set forth in this division.
- (5) Development of databases to be maintained as a public record of certified AABEs, HBEs, ABEs, NABEs and FBEs.
- (6) Ensuring compliance with requirements for mentor-protégé or joint venture arrangements under section 2-1449 and section 2-1450, as applicable.
- (7) Investigation of alleged violations of this division, and the issuance of written statements following any determination of such investigation, stating the reasons therefore and any penalty to be imposed.

- (8) Determination of whether any of the penalties set forth in section 2-1452 should be applied to a business.
- (9) Attendance at pre-bid, pre-proposal, pre-construction and pre-work conferences.
- (10) Provision to business entities of all forms, applications, documents and papers necessary to comply with this division.
- (11) Provision of information to potential Bidders which shall include names and contact information of certified MFBES for each Eligible Project, to reinforce and support outreach efforts by potential Bidders.
- (12) Notification by certified mail that a Bidder who has bid on and who otherwise would have been awarded a contract has the right to appeal a determination of non-responsiveness regarding the requirements of this division, said appeal to be determined by a Contract Compliance Hearing Officer, as provided in section 2-1454, within seven calendar days of receipt of the notice of noncompliance.
- (13) Notification by certified mail that an applicant who has been denied certification as an AABE, HBE, ABE, NABE or FBE, has the right to appeal such determination, said appeal to be determined by a Contract Compliance Hearing Officer, as provided in section 2-1454, within seven calendar days of receipt of the notice of such determination.
- (14) Notification to the Chief Procurement Officer of any determination of non-responsiveness regarding the requirements of this division, and of any appeal from any such determination.
- (15) Monitoring, for data gathering and informational purposes, utilization of MFBES on Eligible Projects.
- (16) Maintenance of documents, forms, records or data regarding this program as provided in this division, including: (a) documents, forms, records or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on Eligible Projects, including the race and gender ownership of each subcontractor and supplier; and (b) documents, forms, records or data regarding certified AABEs, HBEs, ABEs, NABEs and FBEs.
- (17) Development and implementation of outreach and assistance programs to promote equal contracting opportunities for all businesses that wish to do business with the city, in accordance with section 2-1455.

Sec. 2-1448. Equal Business Opportunity Subcontracting Program

(1) Program Requirements.

- (a) All Bidders are required to make efforts to ensure that businesses are not discriminated against on the basis of their race, ethnicity or gender, and to demonstrate compliance with these program requirements at or prior to the time of Bid opening, or upon request by OCC. Bidders are required to ensure that prospective subcontractors, vendors, suppliers and other potential participants are not denied opportunities to compete for work on a City contract on the basis of their race, ethnicity, or gender, and must afford all firms, including those owned by racial or ethnic minorities and women, opportunities to participate in the performance of the business of the City to the extent of their availability, capacity and willingness to compete.
- (b) OCC will review information submitted by Bidders pertaining to efforts to promote opportunities for diverse businesses, including MFBES, to compete for business as subcontractors and/or Suppliers. A Bidder is eligible for award of a City contract upon a finding by OCC that the Bidder has engaged in, and provided with its bid submission documentation of, efforts to ensure that its process of soliciting, evaluating and awarding subcontracts, placing orders, and partnering with other companies has been non-discriminatory. To assist prime contractors in this effort, the Office of Contract Compliance shall set forth in the solicitation documents for the Eligible Project the availability of businesses, including certified MFBES within the relevant NAICS Codes for such Eligible Project.

(2) Determination of Non-discrimination During Bid Process.

No Bidder shall be awarded a contract on an Eligible Project unless the Office of Contract Compliance determines that the Bidder has satisfied the non-discrimination requirement of this section 2-1448 on such Eligible Project. Accordingly, each Bidder shall submit with each Bid the following:

- (a) **Covenant of Non Discrimination.** Each Bidder shall submit with her/his Bid a Covenant of Non-Discrimination in such form as

directed in the solicitation document by the Office of Contract Compliance.

- (b) Outreach Efforts Documentation. Each Bidder shall submit with her/his Bid written documentation demonstrating the Bidder's outreach efforts to identify, contact, contract with, or utilize businesses, including certified MFBES, as subcontractors or Suppliers on the Eligible Project. The Office of Contract Compliance shall set forth in the solicitation document the documents that a bidder may submit to demonstrate its outreach efforts, and such documentation may include, without limitation, evidence of the following:
- i. The Bidder contacted the Office of Contract Compliance, other private sector and government entities, or local MFBE organizations, to identify available businesses to work on the Eligible Project, including certified MFBES, regardless of race, gender or ethnicity.
 - ii. The Bidder placed notices of opportunities for qualified businesses to perform subcontracting work on the Eligible Project in newspapers, trade journals, and other relevant publications, including publications specifically targeted to MFBES, or communicated such notices of opportunities via the Internet or by other available media or means.
 - iii. The Bidder submitted invitations to bid for work on the Eligible Project to qualified businesses, including certified MFBES, regardless of race, gender or ethnicity.
 - iv. The Bidder included in such notices and invitations a full disclosure of the criteria upon which bids, proposals or quotes would be evaluated, and also included contact information for inquiries, submissions, or requests to review any necessary bid documents.
 - v. The Bidder promptly responded to inquiries, provided necessary physical access and time for interested businesses to fully review all necessary bid documents, and otherwise provided information, access and time necessary to allow all interested businesses to prepare bids and quotes, regardless of race, gender or ethnicity.
 - vi. The Bidder considered, or hired, or otherwise utilized qualified and available businesses on the Eligible Project,

including certified MFBEs, regardless of race, gender or ethnicity.

- vii. For each business which contacted or was contacted by the Bidder regarding subcontracting or other services on the Eligible Project, but was not contracted with or otherwise utilized on the Eligible Project, the Bidder shall provide a written statement setting forth the dates of such contacts, the nature of such contacts, and the reasons why an agreement was not reached regarding work to be performed on the project. The Bidder shall maintain all written documents reflecting such contacts, including bids, quotes and proposals.
- (c) Subcontractor Project Plan. Each Bidder shall submit with her/his Bid a completed and signed Subcontractor Project Plan, in a form approved and provided by the Office of Contract Compliance, which lists the name, address, telephone number and contact person of each subcontractor or other business to be used in the contract, the NAICS Code and the type of work or service each business will perform, the dollar value of the work and the scope of work, the ownership of each business by race and gender, if applicable the AABE, HBE, ABE, NABE, or FBE certification number of each business, and any other information requested by the Office of Contract Compliance. In order for the Office of Contract Compliance to officially consider a firm to be an MFBE, the MFBE firm must be certified by or have a certification application pending with the Office of Contract Compliance prior to the Bidder's submission of the Bid.
- (3) OCC Review of Bidder Submissions.
The Office of Contract Compliance shall determine whether a Bidder has satisfied the non-discrimination requirement of this section 2-1448 based on its review of the Covenant of Non Discrimination, the Outreach Efforts Documentation, the Subcontractor Project Plan, and its review of other relevant facts and circumstances, including complaints received as part of the bid process. In reviewing the documents submitted by a Bidder to determine whether the Bidder has satisfied the good faith efforts requirement of this section, the Office of Contract Compliance will consider, among other things, the total project dollars subcontracted to or expended for services performed by other businesses, including certified MFBEs, whether such businesses perform Commercially Useful Functions in the work of the contract based upon standard industry trade practices, whether any amounts paid to Supplier businesses are for goods customarily and ordinarily used based upon standard industry trade practices, and the

availability of certified MFBES within the relevant NAICS Codes for such Eligible Project.

(a) Receipt of Complaint of Discrimination in the Bid Process

The Office of Contract Compliance shall accept complaints of alleged discrimination during the Bid process regarding any participant in the Bid process. Where the complaint of discrimination is specific to the procurement which is under consideration by the City, the Office of Contract Compliance may investigate said complaint, determine its validity, and determine whether the actions complained of impact the Bidder's responsiveness on the specific procurement. Allegations of discrimination based on events, incidents or occurrences which are unrelated to the specific procurement will be placed in the Bidder's file maintained in the Vendor Relations database and handled in accordance with the procedure established in the City's Vendor Relations Ordinance, section 2-1465, et seq.

(b) Determination of Violation of EBO Process

Where the Office of Contract Compliance investigates a complaint of discrimination that is related to the specific Bid process, as described in subsection 2-1448(3)(a) above, the details of that investigation, including findings, shall be recorded and maintained in the Vendor Relations Database, pursuant to Section 2-1469.

(c) Office of Contract Compliance Determination of Non-Responsiveness

When, based upon the totality of the circumstances, the Office of Contract Compliance determines that a bidder has been non-responsive to the EBO requirements of a City Bid solicitation, the Director of the Office of Contract Compliance shall present a written determination of non-responsiveness to the Chief Procurement Officer which states the determination and lists the reasons for the determination.

(4) Equal Business Opportunity Subcontracting Program Bid Process.

The Covenant of Non Discrimination, the Outreach Efforts Documentation, the Subcontractor Project Plan, and any other information required by OCC in the solicitation document must be completed in their entirety by each Bidder and submitted with the other required Bid documents in order for the Bid to be considered as a

responsive Bid. Failure to timely submit these forms, fully completed, will result in the Bid being considered as a non-responsive Bid, and therefore, excluded from consideration.

(5) Contract Progress.

The Office of Contract Compliance shall require contractors on Eligible Projects to complete and submit to OCC documentation regarding their utilization of MFBEs, along with all other pertinent records required by OCC. Said documentation shall be in a format that is established by the Office of Contract Compliance. These records will be submitted to OCC monthly. The Subcontractor Project Plan shall not be changed or altered after approval of the plan and award of the contract without the written approval of the Director of the Office of Contract Compliance. A written letter to the Director of the Office of Contract Compliance requesting approval to change the Subcontractor Project Plan must be submitted prior to any change in the plan or termination of an MFBE's contract.

(6) Database.

The City will maintain a database identifying MFBEs, that will include the types of services provided by the business enterprise and contact information for the business enterprise. A list from the database will be made available to Bidders to assist them in their efforts to meet the requirements of the Equal Business Opportunity Subcontracting program. The list prepared from the database will specify which firms the City of Atlanta has determined to be certified minority and female business enterprises, in accordance with the City of Atlanta definitions for MFBEs. This list is not exhaustive.

(7) Minority and Female Business Enterprise Utilization.

To ensure that the Equal Business Opportunity Subcontracting Program achieves its purpose, the Office of Contract Compliance will verify the MFBE certification status of each firm claiming such designation. Only certified MFBEs may be designated in reports as MFBEs for purposes of City projects. The percentage of MFBEs utilized by a Bidder will be calculated by dividing the MFBE's price for providing direct labor or a bona fide service by the Bidder's total dollars as identified in the Bid.

(8) Equal Business Opportunity Program Compliance, Monitoring and Audit.

The City of Atlanta reserves the right to conduct an audit of a Bidder's work on an Eligible Project to confirm the Bidder's compliance with this Equal Business Opportunity Subcontracting Program, including without

limitation compliance with the Covenant of Non Discrimination, the Outreach Efforts Documentation, and the Subcontractor Project Plan.

(9) Prohibition Against Discrimination and Reporting Allegations. Bidders shall prohibit discrimination against any person or business on the basis of race, color, creed, religion, sex, domestic relationship status, parental status, familial status, sexual orientation, disability, age, national origin, political affiliation, gender identity, or racial profiling. Bidders shall develop a written policy statement that shall be approved by the Office of Contract Compliance and distributed to all employees. Bidders shall conduct their contracting and purchasing programs so as to prohibit any discrimination and to resolve all allegations of discrimination. Bidders shall include a clause in its subcontracts that require the subcontractor to adopt and distribute a written non-discrimination policy that is the same as that of the contractor. The Office of Contract Compliance shall review and investigate all allegations of discrimination which claim that prohibited forms of discrimination have occurred. Allegations of discrimination that are determined to have merit may be subject to penalties decided upon by the Office of Contract Compliance in consultation with the initiating department.

(10) Penalties. Breach of the Equal Business Opportunity Subcontracting program by a Bidder shall be subject to any or all of the penalties set forth in section 2-1473 below.

Sec. 2-1449. Requirements for Mentor-Protégé Relationships.

(1) The Office of Contract Compliance shall encourage, where economically feasible, establishment of mentor-protégé relationships to ensure prime contracting opportunities for all businesses, including certified MFBES on eligible projects.

(2) Based upon the scope of work and market availability, the Office of Contract Compliance shall determine on a project-by-project basis on all eligible projects valued over \$5,000,000.00 whether good faith efforts to enter into a mentor-protégé relationship shall be required for such eligible project. On such eligible projects in which good faith efforts to enter into a mentor-protégé relationship are required, no bid shall be accepted unless submitted by a mentor-protégé team, unless the Office of Contract Compliance has determined that good faith efforts to enter

into a mentor-protégé relationship have been demonstrated. The Office of Contract Compliance shall determine whether good faith efforts to enter into a mentor-protégé relationship have been adequately demonstrated based on a review of relevant facts, documents and circumstances.

(3) On such eligible projects in which good faith efforts to enter into a mentor-protégé relationship are required, the mentor and protégé team members must have different race ownership, different gender ownership, or both. MFBE members of the mentor-protégé team must be certified as such by the Office of Contract Compliance, and the mentor-protégé team shall include in its bid submittal the MFBE certification number of each MFBE team member. A bid submitted by a mentor-protégé team comprised of Bidders with both the same race and gender ownership shall be deemed non-responsive and rejected.

(4) As to each mentor-protégé relationship under this section, a written mentor-protégé agreement must be completed by both parties to the mentor-protégé relationship and executed before a notary public, which clearly delineates the rights and responsibilities of the mentor and protégé, complies with any requirements of the Office of Contract Compliance as set forth in bid documents or otherwise, and provides that the mentor-protégé relationship shall continue for, at a minimum, the duration of the project.

(5) The Office of Contract Compliance shall review and approve all contractual agreements regarding the terms and provisions of the mentor-protégé relationship prior to the award of a contract on an eligible project to the mentor-protégé team. Mentor-protégé teams may submit agreements for pre-approval no later than 14 calendar days prior to the date set for receipt of bids on an eligible project. Otherwise, agreements must be submitted on or before the date set for receipt of bids on an eligible project. A bid submitted by a mentor-protégé team that does not include a satisfactory written mentor-protégé agreement in accordance with the requirements of this section shall be deemed non-responsive and rejected.

(6) During the term of the contract the mentor and protégé businesses must each provide to the Office of Contract Compliance a quarterly summary of the mentor skills provided to the protégé, which shall include:

- (a) The time spent between mentor and protégé businesses in furtherance of the mentor-protégé relationship;

- (b) The nature and extent of managerial, technical, financial and/or bonding assistance provided
- (c) A summary and explanation of any projects bid on or undertaken by the mentor-protégé team in the private sector or for a governmental entity other than the city; and
- (d) Any additional or further information required by the Office of Contract Compliance as set forth in bid documents or otherwise.
- (e) No officer, Director, employee or member of the mentor-protégé team shall be allowed to bid or otherwise participate independently on a contract where the mentor-protégé team is bidding or otherwise participating.
- (f) Each member of the mentor-protégé team shall provide the Office of Contract Compliance access to review all records pertaining to mentor-protégé agreements before and after the award of a contract in order to reasonably assess compliance with this division.
- (g) Penalties for noncompliance. Any responsible bidder who fails to comply with this section shall be subject to any or all of the penalties contained in section 2-1473.

Sec. 2-1450. Requirements for Joint Ventures.

(1) The Office of Contract Compliance shall encourage, where economically feasible, establishment of joint ventures to ensure prime contracting opportunities for all businesses, including certified MFBs, on eligible projects.

(2) Based upon the scope of work and market availability, the Office of Contract Compliance shall determine on a project-by-project basis on all eligible projects valued over \$5,000,000.00 whether good faith efforts to enter into a joint venture shall be required for such project. On such projects in which good faith efforts to enter into a joint venture relationship is required, no bid shall be accepted unless submitted by a joint venture, unless the Office of Contract Compliance has determined that good faith efforts to enter into a joint venture have been demonstrated. The Office of Contract Compliance shall determine whether good faith efforts to enter into a joint venture have been

adequately demonstrated based on a review of relevant facts, documents and circumstances.

(3) On such eligible projects in which good faith efforts to enter into a joint venture relationship is required, the joint venture member businesses must have different race ownership, different gender ownership, or both. MFBE members of the joint venture must be certified as such by the Office of Contract Compliance, and the joint venture team shall include in its Bid submittal the MFBE certification number of each MFBE joint venture member. A bid submitted by a joint venture comprised of Bidders with both the same race and gender ownership shall be deemed non-responsive and rejected.

(4) As to each joint venture under this section, a written joint venture agreement must be completed by all parties to the joint venture and executed before a notary public, which clearly delineates the rights and responsibilities of each member or partner, complies with any requirements of the Office of Contract Compliance as set forth in bid documents or otherwise, and provides that the joint venture shall continue for, at a minimum, the duration of the project.

(5) The Office of Contract Compliance shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship prior to the award of a contract on an eligible project to the joint venture, including agreements pertaining to:

- (a) The initial capital investment of each venture partner;
- (b) The proportional allocation of profits and losses to each venture partner; no M/FBE Venture Partner's Liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture.
- (c) The sharing of the right to control the ownership and management of the joint venture;
- (d) Actual participation of the venture partners on the project;
- (e) The method of and responsibility for accounting;
- (f) The method by which disputes are resolved; and
- (g) Any additional or further information required by the Office of Contract Compliance as set forth in bid

documents or otherwise. Joint ventures may submit agreements for pre-approval no later than 14 calendar days prior to the date set for receipt of bids on an eligible project. Otherwise, agreements must be submitted on or before the date set for receipt of bids on an eligible project. A bid submitted by a joint venture that does not include a satisfactory written joint venture agreement in accordance with the requirements of this section shall be deemed non-responsive and rejected.

(6) The joint venture, and each member of the joint venture, shall provide the Office of Contract Compliance access to review all records pertaining to joint venture agreements before and after the award of a contract in order to reasonably assess compliance with this division.

(7) Penalties for noncompliance. Any responsible bidder who fails to comply with this section shall be subject to any or all of the penalties contained in section 2-1452.

Sec. 2-1451. Mediation of Disputes between Joint Venture and Mentor-Protégé Team Members and Prime and Subcontractors.

(1) If, after the award of a contract to a joint venture or mentor-protégé team, any member of the joint venture or mentor-protégé team believes that the terms and conditions of the agreement as approved by the Office of Contract Compliance have not been complied with, then such member may seek review and mediation of such agreement before the Director of the Office of Contract Compliance. The request for review must be made in writing.

(2) If, after the award of a contract, a dispute arises between the prime contractor and a subcontractor regarding performance of work or provision of services or supplies on the Eligible Project, then such prime contractor or subcontractor may seek review and mediation of the issue before the Director of the Office of Contract Compliance. The request for review must be made in writing. If the dispute involves an alleged violation of the City's Prompt Payment requirement, as set forth in section 2-1476 below, the contractor, subcontractor and the City shall proceed as is set forth in section 2-1476(3).

(3) Within 20 calendar days of receipt of a request for review, if the dispute has not already been resolved informally among the parties, the Director shall set a mediation date, and the Director shall provide written notice of the mediation date to each of the interested parties.

(4) The Director shall have authority to make recommendations in an attempt to resolve the dispute.

(5) In the event that the mediation with the Director of Contract Compliance does not resolve all disputes, the Director of the Office of Contract Compliance shall have the option of referring mediation proceedings to a qualified outside mediator, contingent upon the consent of the interested parties.

Sec. 2-1452. Penalties for Noncompliance.

A contractor who fails to comply with any portion of this division, and whose failure to comply continues for a period of 30 calendar days after the contractor receives written notice of such noncompliance from the Director of the office contract compliance, shall be subject to any or all of the following penalties:

- (1) Withholding of ten percent of all future payments for the eligible project until the Office of Contract Compliance determines that the contractor is in compliance with this division.
- (2) Withholding of all future payments under the eligible project until it is determined that the contractor is in compliance with this division.
- (3) Cancellation of the eligible project.
- (4) Refusal of all future contracts or subcontracts with the City for a minimum of one year and a maximum of five years from the date upon which this penalty is imposed.

Sec. 2-1453. Certification of African American-, Hispanic-, Asian-Native American- and Female-Owned Businesses.

(1) Application for certification. AABEs, HBEs, ABEs, NABEs or FBEs who wish to be certified as such by the Office of Contract Compliance must submit a written certification application on a form approved and provided by the Office of Contract Compliance.

(2) Standards. The Office of Contract Compliance shall determine the eligibility of AABEs, HBEs, ABEs, NABEs and FBEs to be certified according to the following standards:

- (a) The owner of an MFBE must be an African American, Hispanic, Asian, Native American or Female. Bona fide racial or ethnic group memberships shall be established on the basis of the individual's claim that he or she is African American, Hispanic, Asian or Native American, as defined in section 2-1461, and is so regarded by that particular racial or ethnic community.
- (b) The business enterprise seeking certification must be a for-profit entity that is independent and continuing.
- (c) The MFBE owner(s) listed on the certification application must "Own" and "Control" the business, as those terms are defined in section 2-1461 above;
- (e) The MFBE must be able to demonstrate that it is or will be performing a commercially useful function; and
- (f) The MFBE must be located in the Atlanta Region.

(4) The Office of Contract Compliance will certify the applicant as an AABE, HBE, ABE, NABE, or FBE, or provide the applicant with written justification of denial of certification, within 90 days after the date that the Office of Contract Compliance receives a satisfactorily completed application from the applicant.

(5) The Office of Contract Compliance will review and evaluate applications, and may reject an application based on one or more of the following:

- (a) the applicant does not meet the requirements for certification as an AABE, HBE, ABE, NABE, or FBE as set forth in subsection 2-1474 (2).
- (b) the application is not satisfactorily completed within a reasonable period of time, as determined by the Office of Contract Compliance.
- (c) the application contains false information.
- (d) the applicant does not promptly provide required information in connection with the certification review conducted by the Office of Contract Compliance.

(6) Certification Denial. If an AABE, HBE, ABE, NABE or FBE applicant is denied certification on the basis of information submitted, the business cannot reapply for certification for a period of one year from the date of the notice of denial, provided that such business shall

have the right to appeal such denial under section 2-1475, and to be certified if such appeal is decided in its favor.

(7) Investigation. The Office of Contract Compliance shall investigate, including on-site investigation if necessary, African American, Hispanic, Asian, Native American and female business ownership arrangements beyond formal documents submitted by such businesses if:

- (a) The business is applying for certification with the city for the first time;
- (b) The business is newly formed or the business has African American, Hispanic, Asian, Native American and/or female ownership of less than 100 percent;
- (c) There is a previous or continuing employer-employee relationship between or among present owners;
- (d) A business which is not an AABE, HBE, ABE, NABE or FBE has an interest in such entity;
- (e) The ownership of the business has changed since documents have been submitted to the Office of Contract Compliance;
- (f) A review of the documents submitted with the application raises concerns regarding either ownership or control of the business; and/or
- (g) The Director of the Office of Contract Compliance deems it appropriate.

(8) Term. The certification as an AABE, HBE, ABE, NABE or FBE shall expire two years from the date of the approval of the application. Following the expiration date, a business is no longer a certified AABE, HBE, ABE, NABE or FBE. An African American-, Hispanic-, Asian-, Native American- or female-owned business must submit a new application for certification as an AABE, HBE, ABE, NABE or FBE and establish that it continues to meet the requirements in this section in order to be certified as an AABE, HBE, ABE, NABE or FBE.

(9) Graduation. Certified AABEs, HBEs, ABEs, NABEs, or FBEs shall be deemed graduated from being certified as AABEs, HBEs,

ABEs, NABEs, or FBEs when the MFBE has two consecutive years of gross receipts that equal or exceed the average revenue of firms in the same industry classification controlling 75% of the market share. However, the Office of Contract Compliance will continue to ensure that African Americans, Hispanics, Asians, Native Americans and Females are not discriminated against in the procurement process, whether or not such companies are eligible for certification as MFBEs.

(10) Decertification. The Office of Contract Compliance may decertify a business that it finds is not or is no longer a bona fide AABE, HBE, ABE, NABE or FBE. Businesses decertified for reasons other than by voluntary request may not apply for recertification for such time as may be specified, up to one year. A business that is decertified may file an appeal under section 2-1475. Any of the following reasons, which are not intended to be all-inclusive, are sufficient grounds for decertification:

- (a) The business has changed to the extent that it no longer satisfies the ownership, control, and/or other requirements set forth in subsection 2-1474 (2);
- (b) The business fails to submit within a reasonable time period information requested by the Office of Contract Compliance;
- (c) The business ceases to be a viable enterprise for profit because of involuntary bankruptcy, dissolution or other cessation of commerce.
- (d) Information or evidence that was not available to the Office of Contract Compliance at the time the firm was certified is now available, and said information, if known at the time of certification review would have resulted in a denial of certification.
- (e) Information was concealed or misrepresented by the firm in connection with the certification application or review conducted by the Office of Contract Compliance.
- (f) A change in the certification standard or requirements of the City has occurred since the certification of the firm.

(11) Continuing duty. Certified AABEs, HBEs, ABEs, NABEs and FBEs shall be under a continuing duty to inform the Office of Contract Compliance in writing of any changes in the AABEs, HBEs, ABEs, NABEs or FBEs business if, as a result of such changes, the AABEs, HBEs, ABEs, NABEs or FBE no longer satisfies the requirements of subsection 2-1474 (2).

Sec. 2-1454. Appeals.

- (1) Determination of non-responsiveness. A Bidder that is determined to be non-responsive to the requirements of this division by the Office of Contract Compliance, and that otherwise would have been awarded a contract, as determined in consultation with the Chief Procurement Officer, shall receive a written determination by the Director of the Office of Contract Compliance, via certified mail, setting forth the reasons for the determination of non-responsiveness.
- (2) Denial of certification as an AABEs, HBEs, ABEs, NABEs or FBE. Upon denying certification as an AABEs, HBEs, ABEs, NABEs or FBE, the Director of the Office of Contract Compliance shall notify the affected party in writing, via certified mail, setting forth the reasons for the denial of certification.
- (3) Time for filing notice of appeal. Any business that has been denied certification as an AABEs, HBEs, ABEs, NABEs or an FBE, or against whom a final determination of non-responsiveness regarding the requirements of this division has been made by the Office of Contract Compliance, may appeal the final determination of non-responsiveness or denial of AABEs, HBEs, ABEs, NABEs or FBE certification, by filing a notice of appeal with the Director of the Office of Contract Compliance in writing within seven calendar days of receipt of the notice of the final determination of non-responsiveness or denial of certification.
- (4) Posting of appeal security. Any Bidder that files an appeal to a final determination of non-responsiveness by the Office of Contract Compliance must, at the time of filing, post security in the amount of one percent (1 %) of the financial offer of the Appellant. If the Contract Compliance Hearing Officer upholds the determination of the Office of Contract Compliance, he or she shall assess against the Appellant reasonable attorneys' fees and other administrative costs incurred by the City in reviewing and responding to the appeal. If the City is represented by its law department, such fees and costs will be calculated at the hourly rate of each attorney participating in the review and response to the appeal set forth in each attorney's

most recent City paycheck times the number of hours worked by such participating attorneys on the appeal. If the city is represented by outside counsel, such fees and costs will be calculated at the billing rates of the firm's attorneys, plus all out of pocket costs of the firm concerning the appeal. Within fifteen (15) days of ruling against the Appellant, the Contract Compliance Hearing Officer, in consultation with the City's law department and outside counsel, if any, will calculate the City's cost in reviewing and responding to the appeal and will apply the Appellant's bond or certified check to the costs. Any remaining balance of the bond or certified check will be returned to the Appellant.

- (5) Notice of hearing date and hearing. Within three calendar days of receipt of a notice of appeal from an aggrieved party, excluding official holidays, the Director of the Office of Contract Compliance shall forward the notice to the Contract Compliance Hearing Officer.
- (6) Exhaustion of Administrative Remedies. A protestor shall be required to exhaust its administrative remedies before filing suit in any State or Federal court based on a determination of non-responsiveness or denial of certification by the Office of Contract Compliance rendered pursuant to the City's Equal Business Opportunity Ordinance.
- (7) Duties of Contract Compliance Hearing Officer. The duties of the Contract Compliance Hearing Officer shall be as follows:
 - (a) Exclusive jurisdiction of the Contract Compliance Hearing Officer. The Contract Compliance Hearing Officer shall have exclusive jurisdiction in all appeals from denials of certification as an AABE, HBE, ABE, NABE, or FBE and in appeals by a Bidder against whom a determination of non-responsiveness regarding the requirements of this division has been made by the Office of Contract Compliance.
 - (b) The Contract Compliance Hearing Officer shall set a hearing date not more than seven calendar days from the date of receipt of the notice of appeal from the Director of the Office of Contract Compliance, excluding official holidays. The hearing officer shall cause notice of the hearing to be served upon all parties by certified U.S. mail. Such notice shall set forth with particularity the decision being appealed by the aggrieved business and shall include the hearing date, time and place.

- (c) At the hearing, all parties shall be provided a fair and impartial hearing and shall be allowed to produce any and all evidence in either party's possession concerning the final determination of non-responsiveness to the requirements of this division, or the denial of certification as an AABE, HBE, ABE, NABE or FBE

(8) Decision. Within seven calendar days after conclusion of the hearing, excluding official holidays, the Contract Compliance Hearing Officer shall make a written decision on the appeal, which decision shall affirm, alter or reverse the final determination of non-responsiveness or the denial of certification by the Director of the Office of Contract Compliance. The hearing officer shall decide whether the final determination of non-responsiveness or the denial of certification being appealed was in accordance with the law at the time that the Director of the Office of Contract Compliance made the decision being disputed.

(9) Notice of decision. Within seven calendar days after conclusion of the hearing, excluding official holidays, the Contract Compliance Hearing Officer shall issue written notice of the decision on the appeal to all parties. The notice of the decision shall be sent to all parties by certified U.S. mail and shall set forth the reasons for the decision.

(10) Appeal. The decision of the hearing officer shall be binding on all parties, subject to the right of appeal as provided by O.C.G.A. §§ 5-4-1, et seq.

Sec. 2-1455. Outreach and Assistance to Subcontractors by the Office of Contract Compliance.

To ensure that opportunities to participate on city contracts are available to the widest feasible universe of interested, available and qualified businesses, the Office of Contract Compliance shall develop and implement a written comprehensive outreach program aimed at increasing business participation in the City's contracting and procurement process. This program may include, without limitation, any or all of the following:

- (1) The Office of Contract Compliance may disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print and in electronic media (including publications or electronic media targeted to MFBES

and small businesses) information describing the equal business opportunity program, the small business opportunity program, and the functions of the Office of Contract Compliance. In addition, the Office of Contract Compliance may disseminate information in print and/or electronic form, may provide individualized counseling, and/or may conduct seminars regarding the certification process.

(2) The Office of Contract Compliance may establish a procedure to engage in continuous recruitment and outreach efforts directed at business assistance organizations to increase the pool of businesses available to do business with the City. The Office of Contract Compliance may identify suppliers through business development organizations and participation at various trade shows, supplier diversity groups and work with various national and local supplier development counsels and organizations.

(3) The Office of Contract Compliance may disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print and in electronic media information identifying ongoing contracting opportunities with the City, and providing contact information by which businesses may obtain additional information from the Office of Contract Compliance. OCC will provide this information in languages other than English, where appropriate. To the extent feasible, the Office of Contract Compliance may enter into arrangements to share data regarding upcoming City projects, and subcontracting opportunities on the projects, with other businesses and agencies or jurisdictions in the Atlanta region.

(4) The Office of Contract Compliance may assist businesses in submitting bids for eligible projects by disseminating information in print or electronic form, by providing individualized counseling, and/or by conducting seminars regarding the process for submitting a bid on a City project. The Office of Contract Compliance may sponsor "How to do business with the City of Atlanta" seminars and invite a wide array of businesses.

(5) The Office of Contract Compliance may actively encourage businesses to attend the pre-bid conferences, providing face-to-face and one-on-one meeting opportunities with employees of the City within the divisions and departments that are involved with the contracting and procurement process. OCC may establish and implement training and awareness programs with the employees of the City's user departments to educate them with regard to increasing utilization of a wide array of businesses.

(6) The Office of Contract Compliance may provide information and advice to the Department of Procurement regarding the effectiveness of current bidding procedures in facilitating bidding on eligible projects by the widest feasible universe of interested businesses. This information may include suggestions regarding how to arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate the participation of all interested businesses. In this regard, the Office of Contract Compliance may provide and encourage feedback from contractors and subcontractors regarding every aspect of the City's procurement process and may establish a system to allow for anonymous comments to be sent through the mail.

(7) The Office of Contract Compliance may create workshops for businesses located within the City on how to compete in the private sector, including advice on marketing, soliciting, and preparing a bid. OCC may establish a program which will incorporate business and entrepreneurial training and assistance mentoring, matchmaking, individual consulting and regular training workshops and seminars. To accomplish the same, OCC may reach out to and collaborate with regional higher educational institutions.

(8) The Office of Contract Compliance may develop communications and other written materials that are meant to encourage and provide information to contractors to increase their utilization of subcontractors. In addition, OCC may sponsor networking events that allow businesses to meet each other and that create an opportunity for contractors to discuss with subcontractors upcoming needs.

(9) The Office of Contract Compliance may develop a resource directory to be provided to interested businesses, with information regarding assistance in bonding and financing, financial management, accounting, construction management and technical assistance.

(10) The Office of Contract Compliance may establish policies to prohibit discrimination in the provision of credit or bonding regarding City of Atlanta contracts.

(11) The OCC may work with existing service providers in the Atlanta Region: a) Develop a technical assistance program to prepare small businesses to compete for specific contracts; b) Implement and monitor a supportive services program to develop and improve immediate and long term business management, record keeping and financial and accounting capability for businesses; c) Develop and

provide services to help businesses improve their long term development, increase their opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve self sufficiency; d) Establish a program to assist new, start-up or emerging businesses; and e) Assist businesses in developing their capability to utilize emerging technology and conduct business through electronic media.

(12) The Office of Contract Compliance may create and maintain records on all subcontractor participation on City projects. The office may perform investigations regarding the actual utilization of subcontractors during the term of the contract as compared with the anticipated use of subcontractors at the time of Bid submittal. Subcontractors shall report the amount of work they anticipate performing on the contract and will report the actual work performed and the amount billed. The Office of Contract Compliance will allow subcontractors to confirm the status of their subcontracts and the payments received thereunder.

(13) The Office of Contract Compliance may continue to develop its website to provide general information on doing business with the City, on the bid process, on how to get certified, to provide a calendar of events, bid lists, bid status reports, to post solicitation notices, and to provide downloadable forms and other appropriate information. In addition, contractors that have been awarded City contracts may be posted on the website to allow businesses to target their marketing efforts to contractors that have worked or are working with the City.

(14) The Office of Contract Compliance shall establish a mechanism by which a businesses can file an administrative complaint with the City if it believes a prime contractor or the City is discriminating in the award of contracts or subcontracts.

(15) The Office of Contract Compliance is authorized to develop and implement such other and further outreach activities and programs as the Director may from time to time recommend. From time to time an overall evaluation of the effectiveness of the program with regard to non-discrimination in contracting shall be conducted. Appropriate changes to the measures and programs based on the results of the evaluations will be implemented.

Sec. 2-1456. Prompt Payment of Subcontractors

Contractors awarded City of Atlanta contracts shall ensure the prompt and full payment of any subcontractors working on the contract

- (1) Every contract by the City for the performance of work shall contain a provision requiring the prime contractor to certify in writing that all subcontractors and suppliers have been paid promptly for work and materials from previous progress payments received (less any retainage) by the prime contractor prior to receipt of any further progress payments. A contractor is required to pay subcontractors or suppliers funds due from progress payments within three business days of receipt of payment from the City. During the contract and upon completion of the contract, the City may request documentation to certify payment to subcontractors or suppliers. This subsection in no way creates any contractual relationship between any subcontractor and the City or any liability on the City for contractor's failure to make timely payment to the subcontractor.
- (2) A Contractor who fails to ensure the prompt and full payment of subcontractors shall be subject to the penalties set forth under Sec. 2-1473.
- (3) In the event of a good faith dispute regarding the amount of payment due to a subcontractor, contractor and subcontractor shall attend a binding arbitration within seven (7) days of notice by the Office of Contract Compliance in order to resolve any payment disputes. If the arbitrator determines that the subcontractor is entitled to payment under the subcontract, Contractor shall be required to pay the subcontractor within three business days of the arbitrator's decision. In the alternative, the contractor and subcontractor may utilize the mediation mechanism set forth in section 2-1472, but only if such alternative is agreed to by the contractor, subcontractor, and the Director of the Office of Contract Compliance.
- (4) The Director of the Office of Contract Compliance is authorized to make a determination that the interests of the City are best served by issuing joint checks to resolve a dispute between vendors and suppliers, prime and subcontractors or sub consultants, mentors and protégés, or joint venture partners. In such circumstances, the Director of the Office of Contract Compliance will issue a written request to the Chief Financial Officer to issue two checks, in amounts deemed by the Director of the Office of Contract Compliance to be equitable. The Department of Finance will issue these checks exclusively to the Director of the Office of Contract Compliance.

Sec. 2-1457. Reports by the Office of Contract Compliance.

- (1) The Director of the Office of Contract Compliance shall cause to be issued periodically, but no later than 30 months after the effective date of this division, reports on the operation of this division. The Director shall be authorized to contract with or retain outside consultants or experts in connection with preparing a report and to assist in assembly, review and analysis of data necessary to prepare such report.
- (2) The Office of Contract Compliance shall provide to such consultants or experts such records in its custody as may be necessary to evaluate the operation of this division and the extent to which the purposes of this division are accomplished. A report shall include any findings or recommendations regarding the economic opportunities available to AABEs, HBEs, ABEs, NABEs and FBEs in the Atlanta region and any recommendations regarding changes to this division or the enactment of any additional programs, procedures or strategies to better effectuate the purposes of this division.
- (3) Reports issued under this section shall be delivered to the mayor and to the city council, a copy of any report(s) shall be maintained at the Office of Contract Compliance for review, and copies shall be made available to the general public upon written request.

Sec. 2-1458. City's Role in Dispute Resolution

All actions taken by the Office of Contract Compliance to ensure the fair and equitable treatment of subcontractors or joint venture/mentor protégé partners working on City of Atlanta projects or seeking work on City of Atlanta projects are done pursuant to the City's Non-Discrimination Policy and shall not be construed as the City taking a position as to the merits of the dispute nor creating any privity of contract between the City and any contractor or subcontractor. Further, no contractor working on a City of Atlanta project or seeking work from the City of Atlanta shall have any claim against the City for any actions taken to ensure the fair and equitable treatment of subcontractors working on City of Atlanta projects or seeking work on City of Atlanta projects.

Sec. 2-1459. Severability

If any provision of this division or any application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this division which can be given effect without the invalid provisions or applications, and are to this end declared to be severable.

Sec. 2-1460. Sunset

This division shall sunset on September 30, 2011.

Sec. 2-1461- 1465 Reserved.